SUPREME COURT, U.S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1120

ALVIN BEIGEL,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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The petititoner prays for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the case of *United States of America* v. *Alvin Beigel, Joseph Lapi and Anthony Verzino* on January 9, 1967 (— F. 2d —).

Opinion Below

The opinion of Honorable Paul R. Hays, Judge of the United States Court of Appeals for the Second Circuit, dated January 9, 1967, affirming the conviction entered in the United States District Court for the Southern District of New York by Edward Weinfeld, Judge, sitting without a jury, is presently unreported and is appended hereto, *infra,* at pages 23 to 33.

Jurisdiction

Jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1). The judgment, with opinion, affirming the conviction of petitioner and his co-appellants, entered in the United States District Court for the Southern District of New York by Edward Weinfeld, Judge, sitting without a jury (254 F. Supp. 923 (S.D.N.Y. 1966)), was entered on January 9, 1967. Application for an extension of time in which to file this petition from February 8, 1967 up to and including March 8, 1967 was granted without prejudice to the Court's consideration of whether this application has been filed in time, in an Order issued by Mr. Justice Harlan, dated February 21, 1967.

Question Presented

1. Have petitioner's rights under the Fourth Amendment to the United States Constitution been abridged by a determination by the Court below that a state search made by state officers was valid despite the prior determination by state officers was valid, despite the prior determination Fourth Amendment and pursuant to its Rules of Criminal Procedure?

Constitutional and Statutory Provision Involved

1. This case involves the Fourth Amendment to the United States Constitution.

Statement

Prior Proceedings

In the United States District Court for the Southern District of New York petitioner was charged with violating and conspiring to violate 21 U.S.C. Sects. 173, 174 (receipt, concealment and facilitation of transportation of illegally imported narcotic drugs), and of conspiring to violate 26 U.S.C. Sect. 4705 (a) (sale, barter, exchange and giving away of narcotic drugs not in pursuance of a written order form issued by the Secretary of the Treasury), on February 25, 1965 (G.A. 94a).*

A hearing on a motion to controvert the search warrant and to suppress the evidence obtained in violation of petitioner's rights under the Fourth Amendment to the United States Constitution was held before Judge Edmund L. Palmieri of the United States District Court for the Southern District of New York, on April 12 and April 13, 1965. The motion was denied by opinion and order dated April 13, 1965 (G.A. 118a-121a).

Thereafter, the petitioner was tried along with Joseph Lapi, Anthony Verzino and Anthony Cutillo before Judge Edward Weinfeld, sitting without a jury, and with the exception of Anthony Cutillo, all were convicted as charged (G.A. 94a-117a).

Petitioner was sentenced to seven and one-half (7½) years in prison on each conviction, sentences to be served concurrently.

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* "G.A." refers to Government Appendix.

* "B.A." refers to Beigel Appendix.

On appeal to the United States Court of Appeals for the Second Circuit, the conviction was affirmed with opinion by Judge Paul R. Hays, on January 9, 1967.

Evidence Presented Concerning the Motion to Suppress

Detective Roy Cahill testified that on March 21, 1963, the appellant Alvin C. Beigel was about to enter Apartment 2C; he had his key in the door (B.A. 12a) when he was approached by Detective Cahill. Cahill then said, "Hold it there, Al. That's it. You're under arrest" (G.A. 40a) (B.A. 12a). The door was closed when Cahill called out to Beigel (B.A. 14a) (G.A. 40a, 41a). He showed appellant the search warrant after Detective Meehan arrived on the scene, since Meehan had the warrant (B.A. 13a) (G.A. 41a). The brown paper bag that was taken from Beigel was opened and examined within the apartment, and white powder was found and analyzed. Thereafter a search of the apartment was made and a brown suitcase was found. Inside of which was more powder, paraphernalia for packaging and cutting of narcotics and a scale (B.A. 14a; G.A. 42a). At the earlier suppression hearing in the Supreme Court of the State of New York, County of Queens, Detective Cahill had testified that he had approached Beigel as Beigel put the key in the door, and had shown him the search warrant, (without any reference to an arrest) (B.A. 13a). Admittedly, the arrest was made by Detective Meehan (B.A. 13a).

In the Queens Supreme Court at the suppression hearing, Cahill testified:

> "Q. All right, fine, and then, of course, when you testified before Justice Shapiro that the defendant

walked up to the apartment and inserted a key in the door you were telling the truth? A. Yes, Sir."

"Q. Do you recall being asked this question and giving this answer?

Mr. Kreiger: Page 5 of the Queens transcript, Mr. Lawler.

Q. Then what happened? A. I identified myself to him, showed him a search warrant and entered the premises with him.

Q. Was that your answer? A. That was my answer, yes, Sir.

Q. Do you recall searching the defendant Beigel?

A. Yes, I do.

Q. And that was after you entered the premises, isn't that so? A. Yes, it was." (B.A. 15a)

A return for the search warrant was filed by Cahill and included all the property subject of the suppression motion, Defendant's Beigel Exhibit "A" (B.A. 16a). Cahill's memorandum book had notation that as Beigel put the key in the door, identified himself and executed the warrant, but nothing in there mentioned the arrested Beigel, (Govt's Exhibit 17), (Pet. Ex. B.) (B.A. 17a, 18a); B.A. 18a). This memoranda was made within twenty-four hours of the incident.

Detective Francis P. Meehan testified that he was on the stairway between the second and third floor of 37-41 79th Street on March 22, 1963, at about 3:00 A.M. He saw appellant come up the stairs, followed by Detective Cahill and Cahill said, "Hey Al, hold it there" (no reference to an arrest) (B.A. 22a) (G.A. 71a). When he arrived at the doorway of Apartment 2C, the door was slightly ajar (B.A. 22a) (G.A. 71a). Since he had the warrant he showed the

warrant to Beigel outside the apartment (B.A. 22a). He made the affidavit showing he executed the warrant and he was the arresting officer and he took the package which Beigel was carrying right after the arrest (B.A. 22a, 23a).

Meehan also testified that he told Agent Wysor that he arrested Beigel (B.A. 24a). "To the best of my recollection I told him that we showed him a search warrant and he was arrested" (B.A. 24a).

"I told him (Agent Wysor) I showed him the search warrant and we took a paper bag from his (Beigel's) left hand".

"When I looked in the bag and I seen the white powder, I placed him under arrest" (B.A. 25a).

Federal Agent Chantland Wysor testified that he obtained information of what had occurred from both Detectives Cahill and Meehan, and in his official report stated that a search warrant was served upon Beigel and the paper bag was seized. While inside the apartment, they determined the contents of the bag and then Beigel was arrested (B.A. 26a).

Accused of the crimes charged in this case with appellant was Anthony Cutillo, as a co-conspirator and a participant in the substantive crime. He was alleged, at 12:10 A.M. on March 22, 1963 to have driven a blue Buick car, bearing New Jersey License plate number HDD 853, and hand the brown paper bag (Government's Exhibit 14) to another co-conspirator and participant, Joseph Lapi, which subsequently turned up in appellant's possession (B.A. 18a). The sole witness who identified Cutillo was Detective Cahill. Cahill testified that he was so close to Cutillo that he was able to hear a conversation between Lapi and Cutillo (B.A. 19a).

He had Cutillo and his car under observation for six minutes. At one point Cutillo got out of the car and was within five-ten feet of him (B.A. 19a, 20a). He could almost touch him. (B.A. 20a).

Defendant Cutillo was acquitted.

Reasons for Allowance of Writ

1. The crime charged and the evidence found in petitioner's possession dictated the determination of the court below, which ignored the facts, the law, and petitioner's constitutional rights under the Fourth Amendment.

We do not question that a person may commit two crimes by doing or omitting one act—one against the State and one against the Federal government, and the conviction or acquittal in one court is no bar to the prosecution in the other. Nor do we say that this is a case for collateral estoppel to apply since the requirement is that the issue must have been litigated *by the same parties.*

This Court has repeatedly stated, however, that it is opposed to successive, oppressive prosecutions which are precluded by the limitation of the doctrine of double jeopardy. Though this be not double jeopardy, the particular circumstances involved herein created the same danger. As was stated in *United States* v. *Ball,* 163 U.S. 662, 669 (1896):

> "The prohibition is not against being twice punished, but against being twice put in jeopardy, . . ."

It is the same officer, a state police officer, who in two separate instances, in a period of two years, submitted to the State and Federal courts two different versions of

what occurred on the night of the search and arrest. Failing to satisfy the State Supreme Court with one version of what had occurred, he went before the Federal District Court and testified in another fashion.

We believe that the fact that the defendant Beigel was found in possession of a large quantity of heroin had an effect on the ultimate decision in this case. Punishment for his acts were sought and not obtained in the State Court. Therefore, it was determined that he would not escape from the commission of his crimes. As Mr. Justice Douglas stated while dissenting in *Gori* v. *United States,* 367 U.S. 364, 373 (1961):

> "The question is not . . . whether a defendant is 'to receive absolution for his crime' . . . The policy of the Bill of Rights is to make rare indeed the occasions when the citizen can for the same offense be required to run the gantlet twice. The risk of judicial arbitrariness rests where, in my view, the Constitution puts it—on the Government."

As can be seen from the record Detective Cahill's testimony was self-contradictory, as well as in conflict to the testimony of his fellow New York City Police Officer Meehan, representatives of the Federal Bureau of Investigation of Narcotics and all the documentary proof, including the return of the warrant, the inventory of the search and the Federal officer's report (G.A. 40a; B.A. 12a, 13a, 15a, 16a, 17a, 18a, 22a, 24a, 26a).

The hearing Court stated that the sole issue was Cahill's credibility (G.A. 118a). Assuming arguendo, therefore, that that was the sole issue, we are faced with the following facts:

Cahill did not testify in the Supreme Court of the State of New York, County of Queens that he arrested the appellant prior to making the search, but did testify that he had identified himself, showed Beigel the warrant, and entered the premises with him and he then made a search after he entered the premises (B.A. 15a, 16a). A return on the search warrant was made by Cahill and in the return he listed the items taken pursuant to the search warrant (B.A. 16a). The memoranda which he made within twenty-four hours of the incident contained naught about the fact that he arrested Beigel.

Meehan testified that he did not hear Cahill say to the appellant that he was under arrest (G.A. 71a; B.A. 22a). He executed the warrant and he was the arresting officer and he took the package from Beigel (B.A. 22a; B.A. 23a). Meehan told Federal Agent Wysor that they showed Beigel a search warrant and he was arrested; he showed him the search warrant and they took the package from Beigel (B.A. 24a, 25a); after looking into the bag he placed Beigel under arrest.

Federal Agent Wysor testified that both Detective Cahill and Meehan had given him information, which he put in his official report which showed the sequence of events to be, service of the search warrant, seizure of the paper bag, entrance into the apartment, examination of the contents of the bag, and, finally, the arrest of Beigel (B.A. 26a).

At best we have a conflict in the testimony of the government's witnesses. The Court then had to choose which of the government's witnesses to believe. It chose to believe Detective Cahill. Interestingly enough, it chose to believe Detective Cahill concerning the arrest and execu-

tion of the warrant but it chose not to believe Detective Cahill when he testified concerning his identification of one of appellant's co-defendants and co-conspirators, Anthony Cutillo. Cahill, who was the sole identification witness, stated that he was close enough to Cutillo to hear a conversation between him and another; that he had Cutillo under observation for a period of six months; that at one point he was five to ten feet from him and at another point he could almost touch him (B.A. 19a, 20a). Cutillo was acquitted.

We submit that if Detective Cahill was wrong in his identification of Cutillo, he likewise could have been wrong in the sequence of events that occurred on March 22, 1963, particularly in the light that his testimony varied in 1965 and 1966 from that of 1963; that his brother officer, Meehan did not recall the events as Cahill did; that the documentary portion, official reports, not only of Detective Cahill, but of Detective Meehan and Federal agent Wysor, all showed the search preceding the arrest. We thus submit that even if the sole issue was Cahill's credibility, on this issue as well as on the issue of identification of Cutillo, his testimony should have been rejected.

2. That there was a hearing on the motion to suppress in the Federal District Court to determine the validity of the search and seizure made by a state police officer, after a determination by the State Court that such search and seizure was invalid, was in direct refutation of this court's mandates and philosophy concerning the Fourth Amendment to the United States Constitution.

We submit that a State Court must obey certain standards set down by this court (*Escobedo* v. *Illinois*, 378 U.S.

478 (1964); *Miranda* v. *Arizona*, 384 U.S. 436 (1966); *Brady* v. *Maryland*, 373 U.S. 83 (1963); *Gideon* v. *Wainwright*, 372 U.S. 335 (1963); *Rideau* v. *Louisiana*, 373 U.S. 723 (1963); *Griffin* v. *Illinois*, 351 U.S. 12 (1956); *Malloy* v. *Hogan*, 378 U.S. 1 (1964); *Ker* v. *California*, 374 U.S. 23 (1963)).

There is thus a requirement that in these areas of constitutional protection there is a minimal standard which must be applied by the State Courts.

It logically then must follow that the Federal Court may inquire as to whether these minimal standards have been met. Once determining that, and reaching an affirmative conclusion, a separate independent hearing as to the validity of state's actions may not be conducted (*Malloy* v. *Hogan*, *supra*). It is particularly so in the area of searches and seizures (*Ker* v. *California*, *supra*).

We state further that what was involved herein was a state search and arrest. As was stated in *Ker*, a State may set up its own rules as long as they do not violate the constitutional standards. The State did set up certain rules. The State determined that these rules were not met and the suppression of evidence followed.

It is interesting to note that the United States Attorney at the suppression hearing in the Federal Court admitted that the search warrant involved herein did not meet the state standards. However, he sought, successfully, to demonstrate to the court that it did not matter, because a Federal Court could make an independent determination concerning whether the search involved was valid under Federal law.

We submit that the court below was in error. It has no such right. The Circuit Court of Appeals in the Seventh Circuit agrees with our contention herein:

> "This Court does not sit to review the propriety of actions taken by state judges with respect to the admission of evidence, but only to discover whether due process has been accorded petitioner." *United States* v. *Pate*, 357 F. 2d 911, 915 (7th Cir., 1966).

Analogous to the problem herein was the problem faced by the courts concerning the applicability of the Fifth Amendment.

The Fifth Amendment is applicable to the States through the Fourteenth Amendment. *Molloy* v. *Hogan*, 378 U.S. 1 (1964).

Mapp v. *Ohio*, 367 U.S. 643 (1961) stated that the Fourth Amendment is applicable to the States through the Fourteenth Amendment.

> ". . . The Fourth and Fifth Amendments, intertwined as they are, (express) supplementing phases of the same constitutional purpose . . ." *Feldman* v. *United States*, 322 U.S. 487, 489, 490 (1944); See also *Boyd* v. *United States*, 116 U.S. 616, 630-635 (1885); *Mapp* v. *Ohio*, supra.

In Footnote 1, *Murphy* v. *Waterfront Commission of New York*, 378 U.S. 52, 53 (1964) this Court stated since the Fifth Amendment privilege is fully applicable to the State and Federal Government, the basic issue is the same, whether the testimony is compelled by the Federal Government and used by a State, or compelled by a State, and used by the Federal Government.

We submit, as is stated hereinabove, this argument is applicable to the rights under the Fourth Amendment. For in *Murphy* v. *Waterfront Commission of New York, supra,*

on Pages 55 and 56, this Court discussed the policies of the privilege, which we again submit is likewise applicable to the rights under the Fourth Amendment.

> "... our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; ... our fear that self-incriminating statements will be elimited by inhuman treatment and abuses; our sense of fair play which dictates 'a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load' 8 Wigmore, Evidence (McNaughton rev., 1961) 317, our respect for the inviolability of the human personality and of the right of each individual 'to a private enclave, where he may lead a private life,' United States v. Grunewald, 233 F. 2d 556, 581-582 (Frank, J. dissenting) rev'd 353 U.S. 391; ..., and our realization that the privilege, while sometimes 'a shelter to the guilty', is often 'a protection to the innocent.' Quinn v. United States, 349 U.S. 155, 162."
>
> "Most, if not all, of these policies and purposes are defeated when a witness 'can be whipsawed into incriminating himself under both State and Federal law even though' the constitutional privilege against self-incrimination is applicable to each (Cite). This has become especially true in our age of 'cooperative federalism', where the Federal and State Governments are wagering a united front against many types of criminal activity."

We indeed have a fine example of cooperative federalism in the case at bar, Cahill, Meehan, Wysor, to name just a few of the police and federal agents working together, to

convict Beigel. We also have a fine example of the "whipsaw" of Beigel, by State and Federal law enforcement agents to Beigel, and the search of him and his premises.

In *Malloy* v. *Hogan, supra* on Pages 10 and 11, the Supreme Court stated that a State may not provide a lesser privilege than that guaranteed by the United States Constitution. In *Mapp,* the Supreme Court stated that a State can not have a lesser right as to an illegal search and seizure than that guaranteed by the United States Constitution.

As *Malloy* stated on Page 11, "It would be incongruous to have different standards, determine the validity of a claim of privilege." The same incongruity, or worse, would be the effect in the area of illegal searches and seizures if different standards would apply in the Federal and State Courts.

It was to avoid the "shopping around" for a friendly jurisdiction and to obviate the effect of the "silver platter" doctrine that *Elkins* v. *United States,* 364 U.S. 206 (1960), was decided. The Court below has attempted to circumvent the philosophy of *Elkins* and the purpose of *Mapp,* and the cases following.

The silver platter doctrine became suddenly extinct by the decision of this court in *Elkins* v. *United States, supra.* There, the state officers had obtained tainted evidence without Federal participation, and then handed it over to the Federal officer. In the case at bar, we have state officers handing over tainted evidence (so determined by the State Court) with Federal participation to the Federal officer.

Mr. Justice Brennan in a dissenting opinion in *Cleary* v. *Bolger,* 371 U.S. 392, 411 (1962) argued for the proposal that a defendant deserves protection in any forum against evidence illegally obtained, even though it is actually used by the authority innocent of the actual wrongdoing. He further stated that in overruling the "silver platter" doctrine this Court anchored its holding on the disruptive effect upon the federal system of allowing the introduction in the Federal Courts of evidence illegally seized by state officers (citing *Elkins* v. *United States, supra*).

True *Preston* v. *United States,* 376 U.S. 364, 366 (1963) stated that under *Elkins,* the determination whether evidence obtained by state officers and used against a defendant in a Federal trial was obtained by an unreasonable search and seizure was to be judged as if the search and seizure had been made by Federal Officers. *Vuin* v. *Burton,* 327 F. 2d 967, 970 (6th Cir., 1964) held that the determination by a State Court as to execution and service of a search warrant is not binding upon the Federal District Court. See also *Kennedy* v. *Coyle,* 352 F. 2d 867, 870 (7th Cir., 1965); *Miller* v. *United States,* 354 F. 2d 801, 808 (8th Cir. 1966); *United States* v. *One, 1963 Cadillac Hardtop,* 224 F. Supp. 210, 212 (DCED, Wisc. 1963) and *United States* v. *Dross,* 224 F. Supp. 142, 145 (DC NY SD, 1963) which held that the test is of Federal constitutional law. These cases held that the test of probable cause must meet Federal Court standards even though the matter were handled by State Officers. (But see *United States* v. *Pate, supra,* cited on Page 12).

It is our contention that the Federal Court standards are a minimum, and if a state has a higher standard or if there

be no Federal determination or standard in a given area, then the Federal government is bound by the State Court's determination, if it is not violative of any constitutional provision or determination.

New York State, herein, had a standard concerning validity of search warrants. Probable cause must exist for a "night-time" search warrant. That standard admittedly was not met.

We submit, under *United States* v. *Gorman*, 355 F. 2d 151, 156 (2nd Cir., 1965), the sins of the state police officer should be visited upon the federal prosecution under the *Elkins* doctrine.

In *Elkins* v. *United States, supra,* on Pages 223, 224:

> "In determining whether there has been an unreasonable search and seizure by state officers, a federal court must make an independent inquiry, whether or not there has been such an inquiry by a State Court and irrespective of how any such inquiry may have turned out. The test is one of federal law, neither enlarged by what one state court may have countenanced, nor diminished by what another may have colorably suppressed."

The interesting question that now arises is, if we compare *Ker, supra,* and *Elkins, supra,* we find *Ker* modified *Elkins. Ker* held that the State may set up its own standards if they do not conflict with the Fourth Amendment. Since *Elkins* was decided prior to *Mapp, supra,* which held that there was one law concerning search and seizure, its applicability is questioned under the facts of the case at bar. *Elkins* stated that, if it were a Federal search, the Federal Officers must comply with the procedures spelled

out in the Federal Rules of Criminal Procedure. If it were a Federal search then it would not matter what the States have done. However, here, we have a state search. Furthermore, under *Ker,* this Court would have supervisory power over the administration of criminal justice in the Federal Courts, and would thus have supervisory power over a search made by a federal officer. However, under *Ker* no such supervisory power exists over criminal justice in a State Court or over a state search.

On pages 33, 34 of the *Ker* opinion, this court stated:

> "Findings of reasonableness, of course, are respected only insofar as consistent with federal constitutional guarantees . . . The States are not precluded from developing workable rules governing arrests, searches and seizures to meet 'the practical demands of effective criminal investigation and law enforcement' in the States, provided that those rules do not violate the constitutional proscription of unreasonable searches and seizures and the concomitant command that evidence so seized is inadmissible as against one who has standing to complain (Cite) Such a standard implies no derogation of uniformity in applying federal constitutional guarantees but is only a recognition that conditions and circumstances vary just as do investigative and enforcement techniques."

Some States have ignored this proposition: In *People* v. *Mickelson,* 30 Cal. Rptr. 18, 20 (1963), the court interpreted *Elkins* and stated that the conduct of the state officer would be measured against the Federal rules when state secured evidence was offered in Federal prosecutions; and in *Hicks* v. *State,* 156 So. 2d 22, 24 (Florida 1963), it was

held that the States do not have the capacity to determine their rules of evidence in criminal cases when searches and seizures are involved;

> "We are compelled to follow the federal rule that evidence obtained in violation of the Fourth Amendment to the United States Constitution is inadmissible in criminal trials, (citing Ker, amongst other cases)"
>
> *Hawley* v. *Commonwealth,* 206 Va. 479, 482 (1965).

See also *State* v. *LeBlanc,* 217 A. 2d 471, 473 (R. I. 1966); *Shafer* v. *State,* 381 S.W. 2d 254, 258 (Tenn., 1964); *State* v. *Hoyt,* 21 Wisc., 2d 284, 317 (1963), which required the search to be determined by federal constitutional standards; and *Browne* v. *State,* 24 Wisc., 2d 491, 503 (1964) which held that the validity of a search by the state police is a matter of federal constitutional law.

But in *State* v. *Krogness,* 388 P. 2d 120, 122 (Ore., 1963) where police officers of Washington seized evidence and brought it into an Oregon Court, the court held that if the evidence was the fruit of illegal government action it mattered not that it was seized by officers of another jurisdiction, it must be suppressed. (Citing *Wong Sun* v. *United States,* 371 U.S. 471 (1963) *Ker, supra* and *Elkins, supra*).

In *Ellenburg* v. *State,* 113 Ga. App. 585, 587, (1966) interpreting *Ker,* the court stated that there was to be no assumption by it of "supervisory authority over State Courts", nor did *Mapp* imply "total obliteration of said laws resulting in arrest and seizure in favor of Federal

law." Both Federal and State systems can take their own approach so long as each respects the same "fundamental criteria."

In *Hernandez* v. *People,* 153 Colo. 316, 319 (1963), stated:

> "In our view *Mapp, supra,* does not by its terms nationalize the law of search and seizure (citing law review articles) . . . Rules establishing workable state procedures governing searches and seizures even though they may not be strictly in accord with federal procedures, are proper provided that such rules do not violate the Fourth Amendment proscription against unreasonable searches and seizures (citing *Ker*)."

See also *People* v. *Bilderbach,* 62 Cal. 2d 757, 766 (1965); *State* v. *Traub,* 196 A. 2d 755, 756 (Conn. 1963); *People* v. *Rivera,* 14 N.Y. 2d 441, 448 (1964); *People* v. *Ressler,* 17, N.Y. 2d 174, 180 (1966).

In *Commonwealth* v. *Lehan,* 347 Mass. 197, 203, (1964) the court stated in regard to *Ker* that although established Federal standards are regarded as binding on the States, there will be incidents of the exclusionary rule so established, which State Courts may fashion, at least in the first instance.

Confusion exists amongst the various courts, both State and Federal in this area. Apparently, there is one law concerning searches and seizures. Apparently, a State may, nevertheless, make its own rules concerning arrests, search warrants and criminal procedure, as long as it is not violative of the Fourth Amendment to the United States Constitution. New York made such rules. A State Court determined that its rules were violated and suppressed the evidence involved in the court below. The court below

made an independent determination which determination was that the search was valid.

We submit that petitioner's rights to the Fourth Amendment to the United States Constitution have been abridged.

CONCLUSION

Wherefore, for the reasons hereinabove stated, it is respectfully submitted that this petition should be granted.

Respectfully submitted,

JAFFE and FELDMAN
Attorneys for Petitioners

Of Counsel:
EUGENE FELDMAN

APPENDIX A

Order of Affirmance of United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the ninth day of January one thousand nine hundred and sixty-seven.

Present:

HON. STERRY R. WATERMAN,
HON. LEONARD P. MOORE,
HON. PAUL R. HAYS,

Circuit Judges.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—v.—

ALVIN BEIGEL, JOSEPH LAPI and ANTHONY VERZINO,

Defendants-Appellants.

ANTHONY CUTILLO and VINCENT SOVIERO,

Defendants.

Appendix A—Order of Affirmance of United States Court of Appeals for the Second Circuit

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they are hereby affirmed.

A. DANIEL FUSARO
Clerk

APPENDIX B

Opinion of United States Court of Appeals for the Second Circuit (Hays, J.) Affirming Conviction

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 188—September Term, 1966.

(Argued November 18, 1966 Decided January 9, 1967.)

Docket No. 30678

UNITED STATES OF AMERICA,

Appellee,

—v.—

ALVIN BEIGEL, JOSEPH LAPI and ANTHONY VERZINO,

Appellants.

Before:

WATERMAN, MOORE and HAYS,

Circuit Judges.

Appeals from judgments of conviction of violating and conspiring to violate 21 U. S. C. §§173, 174 (receipt, concealment and facilitation of transportation of illegally imported narcotic drugs), and of conspiring to violate 26 U. S. C. §4705(a) (sale, barter, exchange and giving away of narcotic drugs not in pursuance of a written order form issued

by the Secretary of the Treasury), entered in the United States District Court for the Southern District of New York by Edward Weinfeld, *Judge*, sitting without a jury.

Affirmed.

EUGENE FELDMAN, New York, New York (Jaffe and Feldman, on the brief), *for Appellant Beigel.*

FRANK A. LOPEZ, Brooklyn, New York (Rosenberg & Lopez, on the brief), *for Appellant Lapi.*

JOSEPH I. STONE, New York, New York (Stone & Diller, on the brief), *for Appellant Verzino.*

ANDREW M. LAWLER, JR. (Robert M. Morgenthau, United States Attorney for the Southern District of New York, Lars I. Kulleseid and John E. Sprizzo, Assistant United States Attorneys, on the brief), *for Appellee.*

HAYS, *Circuit Judge*:

Appellants Alvin Beigel, Joseph Lapi and Anthony Verzino were convicted of violating 21 U. S. C. §§173, 174[1]

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[1] §173. *Importation of narcotic drugs prohibited; exceptions; crude opium for manufacture of heroin; forfeitures.*

It is unlawful to import or bring any narcotic drug into the United States or any territory under its control or jurisdiction.

. . .

and conspiring to violate those sections as well as 26 U. S. C. §4705(a).[2] The case was tried to the court sitting without a jury and the opinion of the trial judge is reported at 254 F. Supp. 923 (S. D. N. Y. 1966). Two other defendants were charged in the same indictment. One, Anthony Cutillo, was acquitted. The other, Vincent Soviero, has not yet been apprehended and the counts against him were severed before trial. The principal contention of all three appellants is that certain contraband introduced in evidence was illegally seized from Beigel and should have been suppressed. Lapi and Verzino also challenge the sufficiency

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§174. *Same; penalty; evidence.*

Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explained the possession to the satisfaction of the jury.

[2] §4705. *Order forms.*

(a) *General requirement.*

It shall be unlawful for any person to sell, barter, exchange, or give away narcotic drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary or his delegate.

of the evidence on which their convictions are based and Verzino contends that he was denied his constitutional right to a speedy trial. We find no error and affirm the convictions.

In August, 1962 agents of the Federal Bureau of Narcotics and detectives of the New York City Narcotics Squad began surveillance of the activities of appellants. On February 5, 1963 the following conversation between Verzino and an unidentified John Doe was overheard:

> "Verzino: I told him $5500, no less.
>
> John Doe: You know you have to be careful in this business.
>
> Verzino: I feel sorry for Louis.
>
> John Doe: Louis who?
>
> Verzino: Louis Gold, that Puerto Rican that got jammed up. I took care of him before he got busted."

Soviero then arrived and John Doe asked him, "Is it in the same place, in the ashtray?" Soviero replied, "Yes, right behind the ashtray," whereupon Doe said, "I will see you tomorrow with the money."

A short time later Doe entered a parked car a few blocks away, reached down under the dashboard and then drove away. The other two men went to a nearby bar where the following conversation was overheard:

> "Verzino: For that guy we charge 7500.
>
> Soviero: That's right. Did Al mix the stuff good?
>
> Verzino: Yes, he mixed it three to one and it's still dynamite."

In the argot of narcotic traffickers the phrase "three to one" indicates that the heroin ("stuff") has been diluted

three parts of adulterant to each part of heroin and "dynamite" indicates the high quality of the drug.

On February 21, 1963 Verzino and Soviero were observed with appellant Alvin Beigel at the Manhattan coffee shop where the February 5th meeting had occurred. Shortly after they left, they were joined by the John Doe who had participated in the earlier meeting. Verzino went with Doe to a parked car, opened the trunk and handed Doe a package. Beigel then drove off in a car identified as the one which Doe had driven on February 5th. Later that evening Verzino, Soviero and Beigel were again seen engaged in a brief conversation.

Federal agents and New York City detectives continued surveillance of all the defendants during the next several days. On February 28th, Verzino and Soviero were again overheard in a New York bar:

> "Soviero: I called his place and left a message for him in case he calls. I told him to stay where he is and Al will meet him and deliver—bring the stuff.
> Verzino: Suppose he leaves?
> Soviero: He will probably go to his place and she'll tell him to go back.
> Verzino: How come Al is late?
> Soviero: He had that delivery at 8 o'clock."

About an hour and a half later Beigel, whose activities had been under fairly constant observation that day, joined Soviero and Verzino.

On March 14th the agents followed Beigel who was driving a rented 1963 Rambler, to 37-41 79th Street in Queens; by tracing a fluorescent powder that they had placed on the

door handle of the Rambler, they determined that Beigel had entered apartment 2C.

At about 7:30 on the evening of March 21, 1963 the government agents observed another Rambler automobile, parked on York Avenue in Manhattan between 60th and 61st Streets. Beigel had also rented this car. Soon thereafter Verzino and Soviero were seen driving down York Avenue. As their car approached the parked Rambler it came to an almost complete stop, and they were seen to look in the direction of the Rambler before continuing on their way.

At about 8:30 P.M., appellant Lapi entered the Rambler and drove it, taking a circuitous route, to 58th Street off Sutton Place. He proceeded on foot to the Cheer Club, located on 2d Avenue between 57th and 58th Streets and was observed for the next few hours walking in and out of the Club as though looking for someone. Shortly after midnight Lapi conversed briefly with the driver of a car parked nearby and then entered the back seat. The car was driven to the vicinity of the parked Rambler, where the driver was observed handing a brown paper bag to Lapi who walked over to the Rambler and placed the package in it.

Surveillance was maintained on the Rambler and at approximately 2:00 A.M. Beigel was observed to enter the car and drive off. He parked the car near 37-41 79th Street, got out and went into that building carrying the brown paper bag that the agents had seen Lapi place in the Rambler earlier. When Beigel had inserted his key in the lock of the door to apartment 2C and was about to enter,

he was placed under arrest. The brown paper bag contained 2920 grams of heroin. In the apartment the officers found a suitcase containing two kilograms of heroin and an assortment of narcotic cutting and packaging equipment.

I

Beigel contends that the contraband was illegally seized and should have been suppressed; Lapi and Verzino failed to raise this objection below but join in Beigel's argument on this appeal.

Both Judge Palmieri, who conducted a pretrial suppression hearing, and Judge Weinfeld, who presided at the trial, found that Beigel's arrest was lawful since the activities which the participating officers, federal and state, had observed and the conversation which had been overheard provided ample probable cause for believing that Beigel had committed, and was committing, a felony. See 26 U.S.C. §7607(2); New York Code Crim. Pro. §177. The search of Beigel's person and the consequent seizure of the brown bag containing heroin were incidental to this lawful arrest and therefore valid. See, *e.g.*, *Draper* v. *United States*, 358 U. S. 307, 310-11 (1959); *United States* v. *Rabinowitz*, 339 U. S. 56 (1950); *DiBella* v. *United States*, 284 F. 2d 897 (2d Cir. 1960), rev'd on other grounds, 369 U. S. 121 (1962).

The search of the apartment presents a different question. Had the officers not arrested Beigel until after he had entered the apartment, the seizure of the additional contraband would have been clearly lawful. See *United States* v. *Rabinowitz, supra; Agnello* v. *United States*, 269

U. S. 20, 30 (1925); *Carlo* v. *United States,* 286 F. 2d 841 (2d Cir.), cert. denied, 366 U. S. 944 (1961). However, it appears from Judge Weinfeld's opinion that in finding Beigel guilty he did not rely on the evidence seized in the apartment but on other evidence which fully supports Beigel's conviction.[3] Therefore we need not decide whether the fact that Beigel was arrested while still outside his apartment renders the search unlawful. See *United States* v. *Mont,* 306 F. 2d 412, 415 (2d Cir.), cert. denied, 371 U. S. 935 (1962); *Williams* v. *United States,* 260 F. 2d 125, 128-30 (8th Cir. 1958), cert. denied, 359 U. S. 918 (1959); *Clifton* v. *United States,* 224 F. 2d 329 (4th Cir.), cert. denied, 350 U. S. 894 (1955).

Appellants also contend that the narcotics should have been suppressed because the New York Supreme Court held insufficient a state search warrant on which it is claimed that the officers relied. The state court barred the use of the seized contraband in a state criminal trial against Beigel.

The theory on which appellants proceed is obscure. Certainly principles of collateral estoppel do not bar the federal government from using this evidence, both because the United States was not a party to the state proceeding and because the contention that the search and seizure were valid as incidents of Beigel's lawful arrest was not litigated in the state court. See *Ferina* v. *United States,* 340 F. 2d

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[3] "[O]nce the heroin seized from defendant's person at the threshold of the apartment is held legally seized and admissible as evidence, in practical terms and end result it is of little consequence whether the other heroin and the narcotics paraphernalia is received in evidence." 254 F. Supp. at 931.

837, 839-40 (8th Cir.), cert. denied, 381 U. S. 902 (1965); cf. *Laughlin* v. *United States*, 344 F. 2d 187, 189-90 (D. C. Cir. 1965).

There is no substance to appellants' argument that the state suppression order is binding on the federal courts under the decisions in *Malloy* v. *Hogan*, 378 U. S. 1 (1964) and *Murphy* v. *Waterfront Comm'n*, 378 U. S. 52 (1964). Those cases involve the availability and scope of the privilege against self-incrimination and are inapposite here. Nothing in those decisions affects the duty of the federal courts to make an independent inquiry concerning the admissibility of evidence in federal cases. See *Rios* v. *United States*, 364 U. S. 253 (1960); cf. *Ker* v. *California*, 374 U. S. 23, 30-34 (1963); *Elkins* v. *United States*, 364 U. S. 206, 223-24 (1960).

In any event, appellants Lapi and Verzino have no standing to obtain suppression of the evidence seized from Beigel. "In order to qualify as a 'person aggrieved by an unlawful search and seizure' [Fed. R. Crim. P. 41(e)] one must have been a victim of a search or seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else." *Jones* v. *United States*, 362 U. S. 257, 261 (1960); *Wong Sun* v. *United States*, 371 U. S. 471, 491-92 (1963). Since neither Lapi nor Verzino was "on the 'premises' where the search occurred and their conviction[s] did not flow from the possession by either one of them of the [drugs] at the time of [the] search," they cannot challenge the legality of the search. *Diaz-Rosendo* v. *United*

States, 357 F. 2d 124, 130-34 (9th Cir. 1966) (*en banc*); *United States* v. *Granello,* 365 F. 2d 990, 995-96 (2d Cir. 1966); *United States* v. *Bozza,* 365 F. 2d 206, 222-23 (2d Cir. 1966). Moreover, having failed to make any objection below, they may not raise the issue for the first time on appeal. *United States* v. *Herskovitz,* 209 F. 2d 881, 886 (2d Cir. 1954).

II.

Appellants raise several other claims of error which can be dealt with summarily. Lapi and Verzino challenge the sufficiency of the evidence supporting their convictions. The trial court's finding that Lapi, in furtherance of the conspiracy, drove the Rambler to 58th Street off Sutton Place and later placed in the car a brown paper bag which he knew contained heroin, is amply supported by the evidence and constitutes a sufficient basis for his conviction.

Verzino's participation in the conspiracy was also satisfactorily established. There was testimony that he had been seen and overheard in numerous conversations with the other defendants, that during these conversations the sale, delivery, content and price of narcotics were all discussed and that Verzino had handed a package to a John Doe under circumstances suggesting that drugs were involved. Verzino's apparent ability to fix prices for narcotics and to assure their delivery, as the trial court found, is sufficient to establish his constructive possession of the narcotics. See e.g., *United States* v. *Jones,* 308 F. 2d 26, 30-31 (2d Cir. 1962) (*en banc*); *United States* v. *Hernandez,* 290 F. 2d 86, 90 (2d Cir. 1961).

Verzino argues that a delay of almost two years between the seizure of the narcotics and his arrest deprived him of due process of law under the Fifth Amendment. His claim that the delay prejudiced his rights finds no support in the record. Such a delay is not grounds for reversal in the absence of a showing that it was "prejudicial or part of a deliberate, purposeful and oppressive design." *United States* v. *Rivera,* 346 F. 2d 942, 943 (2d Cir. 1965), quoting *United States* v. *Wilson,* 342 F. 2d 782, 783 (2d Cir.), cert. denied, 382 U. S. 860 (1965). Moreover, Verzino waived this objection by failing to raise it until after all the parties had rested at trial. *United States* v. *Sanchez,* 361 F. 2d 824, 825 (2d Cir. 1966); *D'Ercole* v. *United States,* 361 F. 2d 211, 212 (2d Cir. 1966).

Finally, Beigel contends that he was prejudiced by the trial court's ruling permitting Verzino, who testified at the trial, to invoke his Fifth Amendment privilege against self-incriminatiton while being cross-examined by the government. Beigel did not object when the ruling was made and did not use the opportunity offered him to cross-examine Verzino. He cannot now claim prejudice. *United States* v. *Indiviglio,* 352 F. 2d 276 (2d Cir. 1965) (*en banc*), cert. denied, 383 U. S. 907 (1966).

We have examined appellants' other assignments of error and find them without merit.

The judgments of conviction are affirmed.